

# McMANIMON & SCOTLAND

ATTORNEYS AT LAW

TRENTON, NEW JERSEY 08608-1104

172 WEST STATE STREET  
(609) 278-1800  
FAX (609) 278-9222

WASHINGTON, D.C. 20004-2404

1275 PENNSYLVANIA AVENUE, N.W.  
SUITE 500  
(202) 638-3100  
FAX (202) 638-4222

ONE GATEWAY CENTER

NEWARK, NEW JERSEY 07102-5311

(201) 622-1800

FAX (201) 622-7333

FAX (201) 622-3744

ATLANTIC CITY, NEW JERSEY 08401-7324

26 SOUTH PENNSYLVANIA AVENUE  
SUITE 200  
(609) 347-0040  
FAX (609) 347-0866

October 31, 1994

Honorable C. Judson Hamlin  
Superior Court of New Jersey  
Middlesex County Courthouse  
1 Kennedy Square  
New Brunswick, NJ

Re: City of Perth Amboy v. Madison Industries, et al.  
Docket Nos. C4476-76 and L-28115-76 Consolidated

Dear Judge Hamlin:

I am in receipt of Mr. Bigham's late submission in opposition to the City of Perth Amboy's ("City" or "Perth Amboy") Order to Show Cause. Although I would generally request more than one business day to reply, given the nature of the response and the need to take immediate action to remove the hazardous waste piles, please accept this letter in reply to the opposition submitted by Madison Industries.

**THE AUTOMATIC STAY PROVISIONS OF THE U.S BANKRUPTCY CODE DO  
NOT LIMIT THIS COURT'S POWER TO PROTECT THE POTABLE WATER  
SUPPLY OF THE STATE OF NEW JERSEY**

Attached hereto as Exhibit A is an Order entered on April 3, 1993 by U.S Bankruptcy Judge William H. Gindin. This Order explicitly remands this matter to State Court for further

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Honorable C. Judson Hamlin  
October 31, 1994  
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proceedings, except for the provisions of Paragraph 8 contained within Your Honor's July 2, 1992 Order. Also attached as Exhibit B is Judge Gindin's May 5, 1993 Order enjoining the State of New Jersey from proceeding with an enforcement action against Madison Industries arising out of the improper storage of hazardous waste. Also Attached as Exhibit C is U.S. District Court Judge Garrett E. Brown's Memorandum and Order reversing Judge Gindin's May 5, 1993 Order clarifying the power of the State Court to adjudicate actions brought to protect the environment.

As Judge Brown held, actions taken by governmental units to protect the environment are not automatically stayed pursuant to the U.S. Bankruptcy Code. The Third Circuit, in Penn Terra Ltd. v. Dept. of Environ. Resources, 733 F.2d 267, 274 (3rd Cir. 1984), allowed the enforcement of environmental laws stating, "No more obvious exercise of the State's power to protect the health, safety, and welfare of the public can be imagined." The Third Circuit subsequently upheld a state court's power to protect the environment in In Re Torwico Electronics, Inc., 8 F.3d 146 (3rd Cir. 1993), where the Court noted that obligations imposed pursuant to police powers intended to protect the public health, safety, welfare and environment from an ongoing and continuing threat are not automatically stayed under the Code. Id. at 150.

Madison further argues that the automatic stay exception in the Code is limited to State action. This, too, is clearly without basis. The relevant provisions of the Code clearly speak

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in terms of actions by "governmental units," not States. "Governmental Unit" is defined within the Code, at 11 U.S.C. § 101, as follows:

(27) "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government;

11 U.S.C. § 101(27) (emphasis added).

Thus, it is clear that the Code intends for actions taken by municipalities, such as Perth Amboy, under their inherent police powers to be excepted to the automatic stay otherwise allowed by the Code.<sup>1</sup>

**MADISON'S REMAINING ARGUMENTS PROVIDE NO CAUSE WHY THE  
HAZARDOUS WASTE PILES SHOULD NOT BE IMMEDIATELY REMOVED**

To the extent that Madison relies on the argument that the piles at the site today are not the piles which were subject to the 1988 Order, such reliance is misplaced. While Madison correctly points out that Paragraph 7 of the 1988 Order refers to piles previously removed or stored, Madison ignores the prospective mandate of the Order which requires that all future

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<sup>1</sup> To the extent that Perth Amboy has brought this Order to Show Cause in order to protect the safety, health and general welfare of its citizenry from harmful environmental hazards, it is a clear exercise of its constitutionally conferred police powers, regardless of whether the actual site of the hazard lies in the boundaries of Perth Amboy or Old Bridge Township.

Honorable C. Judson Hamlin

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waste piles must be stored in permanent enclosed structures and in a manner which prevents zinc, lead and cadmium from being placed in an area where they might flow or drain into said waters. (See Order, April 27, 1988.) Clearly the materials at issue here are not stored in a permanent structure and do pose a significant risk of flowing or draining into the waters of the State. Accordingly, Madison's piling of hazardous materials is clearly a violation of both the letter and spirit of the 1988 Order.

Madison's argument that the City's request for protection of its water supply should be denied because the State has filed a similar action is incorrect. The issue before this Court is whether there is a potential threat to the City's water supply or whether a prior Court Order has been violated. The cases relied upon by Madison lend no support to its position. Trustees of Princeton University v. Trust Co. of N.J., 22 N.J. 587 (1956), involving a probate dispute between two different States, is irrelevant. Further, to the extent that Stamen v. Metropolitan Life Ins. Co., 41 N.J. Super. 135 (App. Div. 1956) stands for the principle that where possible a controversy should be determined by the court which first obtains jurisdiction, its holding supports the City's claim. The fact that the DEP chose to file a separate action against Madison regarding the piles does not prevent the City from exercising its right to protect its water supply.

Madison's attempt to cover the piles in the last few days and its conclusory assertions in the Vroeginbay affidavit that the piles do not pose a threat to the environment provides no substantive basis for the Court to deny the relief sought by the City. It is without dispute that

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the piles exist at the border of the Runyon Watershed, that they contain hazardous substances and that these same substances are found in Pricketts Brook flowing onto the City's property.

### CONCLUSION

Based upon the foregoing arguments and the previous record in this case it is clear that there is a significant and immediate threat to the health to the health and welfare of the citizens of Perth Amboy and other citizens of the State of New Jersey. Therefore, it is respectfully requested that Your Honor order the prompt and safe removal of all hazardous waste piles stored on the Madison facility these piles.

Thank you for your consideration in this matter.

Respectfully,

McMANIMON & SCOTLAND



James R. Gregory

JRG:c

cc: William A. Bigham, Esq.  
Steven T. Singer, Esq.  
Charles A. Licata, D.A.G.  
Mayor Joseph Vas  
Dennis Gonzalez, Esq.  
Larry Pollex, Dir., MUA



FREDERICK A. DEVESA  
ACTING ATTORNEY GENERAL OF NEW JERSEY  
25 Market Street  
R.J. Hughes Justice Complex  
CN 118  
Trenton, New Jersey 08625  
Attorney for Department of  
Environmental Protection  
and Energy

By: Charles A. Licata (CL 8105)  
First Assistant State Environmental Prosecutor  
(609) 292-3924

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW JERSEY

In Re: ) HON. WILLIAM H. GINDIN, U.S.B.J.

MADISON INDUSTRIES, INC., )

Debtor. )

CHAPTER 11 OF  
THE BANKRUPTCY CODE

CITY OF PERTH AMBOY, a )  
municipal corporation of the )  
State of New Jersey, )

Plaintiff, )

CASE NO. 92-37446 (WHG)

v. )

MADISON INDUSTRIES, INC., ET AL., )

Defendants. )

ORDER GRANTING MOTION OF  
STATE OF NEW JERSEY TO  
REMAND TO STATE COURT

-----  
STATE OF NEW JERSEY, DEPARTMENT )  
OF ENVIRONMENTAL PROTECTION, )

Plaintiff, )

Hearing Date: April 21, 1993  
10:00 a.m.

v. )

CHEMICALS AND POLLUTION )  
SCIENCES, INC., ET AL., )

and MADISON INDUSTRIES, INC., )

Defendants. )

This matter having been brought before the Court by  
Frederick A. DeVesa, Acting Attorney General of New Jersey, Charles

A. Licata, First Assistant State Environmental Prosecutor, appearing, seeking the entry of an Order granting the State of New Jersey, Department of Environmental Protection and Energy's motion to remand the above captioned matter to state court; and the Court having reviewed the moving papers, and papers submitted in support of and in opposition to the motion, and having heard argument of counsel;

IT IS, on this <sup>June</sup> ~~May~~ day of ~~May~~, 1993,

ORDERED that the above captioned matter be and hereby is remanded to state court with the exception of the enforcement of the Order signed by the Honorable C. Judson Hamlin, J.S.C., on July 2, 1992, to the extent that Paragraph 8 required Madison to deposit certain funds in an escrow account to be used for the cleanup of the groundwater of the aquifer at the Runyon Watershed and as amended by the Order Modifying Paragraph 8 of the July 2, 1992 Order, signed by Judge Hamlin on November 16, 1993, and the Order for Judgement Nunc Pro Tunc against Madison signed by Judge Hamlin on December 5, 1992. Subject to the aforementioned, this matter may proceed accordingly in state court.

**WILLIAM H. GINDIN**

---

William H. Gindin, C.U.S.B.J.

**Exhibit B**



FREDERICK A. DEVESA  
ACTING ATTORNEY GENERAL OF NEW JERSEY  
25 Market Street  
R.J. Hughes Justice Complex  
CN 118  
Trenton, New Jersey 08625  
Attorney for Department of  
Environmental Protection  
and Energy

By: Charles A. Licata (CL 8105)  
First Assistant State Environmental Prosecutor  
(609) 292-3924

COPIES TO  
\_\_\_ UST  
\_\_\_ DBTR  
\_\_\_ DATA ENTRY  
DATE 5/10 BY ell

TRUS.  
COUNSEL

MAY 14 1993

OFFICE OF THE  
ENVIRONMENTAL PROSECUTOR  
FILED  
JAMES J. WALDRON

MAY 5 1993

U.S. BANKRUPTCY COURT  
TRENTON, NJ

BY B. Paul DEPUTY

5/7/93

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW JERSEY

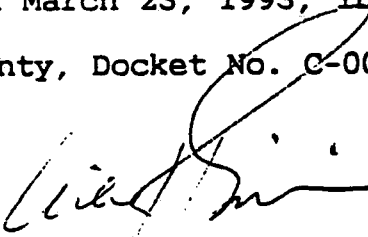
In Re:	)	HON. WILLIAM H. GINDIN, U.S.B.J.
MADISON INDUSTRIES, INC.,	)	
Debtor.	)	CHAPTER 11 OF THE BANKRUPTCY CODE
<u>CITY OF PERTH AMBOY, a</u>	)	
municipal corporation of the	)	
State of New Jersey,	)	
Plaintiff,	)	CASE NO. 92-37446 (WHG)
v.	)	
MADISON INDUSTRIES, INC., ET AL.,	)	ORDER ENJOINING THE STATE OF NEW JERSEY PURSUANT TO 11 U.S.C. 362(a) FROM PROCEEDING WITH STATE COURT ENFORCE- MENT ACTION.
Defendants.	)	
-----	)	
STATE OF NEW JERSEY, DEPARTMENT	)	
OF ENVIRONMENTAL PROTECTION,	)	
Plaintiff,	)	Hearing Date: April 21, 1993 10:00 a.m.
v.	)	
CHEMICALS AND POLLUTION	)	
SCIENCES, INC., ET AL.,	)	
and MADISON INDUSTRIES, INC.,	)	
Defendants.	)	

This matter having been brought sua sponte by the Court  
(Hon. William H. Gindin, C.U.S.B.J.); and Frederick A. DeVesa,  
Acting Attorney General of New Jersey, Charles A. Licata, First

Assistant State Environmental Prosecutor, appearing; and the Court having reviewed the papers submitted and having heard argument of counsel; and the State of New Jersey, Department of Environmental Protection and Energy ("State"), having filed suit on March 23, 1993 in the Superior Court of New Jersey against Madison Industries, Inc., et als., Docket No. C-000093-93, to enforce certain environmental laws of the State of New Jersey, specifically, the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq.; and the State seeking an order requiring Madison to test and/or remove illegal piles of hazardous waste from its property; and the Court having found that this action was not exempt from the automatic stay pursuant to 11 U.S.C. 362(b)(4) and (5);

IT IS on this <sup>5<sup>th</sup></sup> day of May, 1993,

ORDERED that the State be, and hereby is, enjoined pursuant to the automatic stay provisions of 11 U.S.C. 362(a), from proceeding with the enforcement action only as instituted against Madison Industries, Inc., on March 23, 1993, in the Superior Court of New Jersey, Middlesex County, Docket No. C-000093-93.



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William H. Gindin, C.U.S.B.J.



**NOT FOR PUBLICATION****UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

State of New Jersey, Department of  
Environmental Protection and Energy,

Plaintiff,

v.

Madison Industries, Inc.,

Defendant.

**BROWN, District Judge**

Civ. No. 93-2347 (GEB)

**MEMORANDUM AND ORDER**

This matter comes before the Court on an appeal by the State of New Jersey, Department of Environmental Protection and Energy from the bankruptcy court's Order, filed June 25, 1993, in favor of Madison Industries, Inc. and this Court has jurisdiction in accordance with 28 U.S.C.A. § 158(a) (West 1993). For the reasons set forth herein, the decision below is hereby reversed.

**I. BACKGROUND**

Madison Industries, Inc. ("Madison") and an affiliate, Old Bridge Chemicals, Inc. ("OBC"), operate a chemical manufacturing operation at Old Waterworks Road in Old Bridge Township, New Jersey.<sup>1</sup> Specifically, the companies receive raw materials for the production of copper chloride and copper ammonium chloride used in the manufacture of copper and zinc chemicals and co-product micronutrient fertilizer. Stored on the industrial site in Old Bridge Township is a large, open and uncovered pile of fertilizer co-products. The Department of Environmental Protection and Energy

<sup>1</sup> OBC is a defendant in the state court action as are Arnet Realty—owner of the site—and Hyman Bzura, Nettie Bzura and Arnold Asmanthe, principals of Madison, OBC and Arnet Realty.

(the "DEPE") contends that this open fertilizer pile violates the Resource Conservation and Recovery Act of 1976 (the "RCRA"), codified in 42 U.S.C. §§ 6901-6991.<sup>3</sup>

In October, 1988, OBC filed a petition requesting that the DEPE evaluate OBC as a waste reuse facility. As part of the evaluation process, the DEPE inspected the manufacturing site of OBC and Madison. While inspecting the site, the DEPE discovered a large uncovered fertilizer pile. On or about January, 1990, the DEPE denied OBC's request to operate as a waste reuse facility and determined that the uncovered fertilizer pile stored on the industrial site required analysis for purposes of New Jersey's environmental laws. Subsequently, the DEPE notified Madison and OBC that the pile was classified as solid hazardous waste stored and handled in breach of the state environmental laws. Madison and OBC contested the DEPE's finding which identified the fertilizer pile as hazardous waste. As a result, Madison and OBC sought an administrative appeal of this determination.

Upon receiving no immediate response to the request for an administrative appeal, OBC moved for leave to appeal and for emergent relief before the Appellate Division of the Superior Court of New Jersey. Prior to the Appellate Division consideration of OBC's application, OBC and DEPE agreed to a stay of all proceedings until a formal ruling by the Commissioner of the DEPE was rendered on the issue of the fertilizer pile as hazardous waste. As of yet no determination has been made.

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<sup>3</sup> RCRA is a federal directive promulgated for the regulation of hazardous waste generation, treatment, storage, and disposal to promote health and welfare. As authorized by the United States Environmental Protection Agency, states can adopt their own hazardous waste plan in reciprocate for RCRA. The New Jersey Legislature adopted their own version of the RCRA when promulgating the implementing regulations, N.J.A.C. §7:26-1 *et seq.*, under the Solid Waste Management Act (the "SWMA"), codified in N.J.S.A. §13:1E-1 *et seq.* Pursuant to N.J.A.C. §7:26-7.4(a), every hazardous waste generator, such as Madison and OBC, must comply with various identification and tracking procedures when generating, storing, and transporting solid waste materials. The DEPE alleges that Madison, OBC, and the other defendants violated such state environmental laws by storing an open, uncovered pile of fertilizer co-products on their industrial site.

Since 1981, Madison and the other defendants have been involved in a number of lawsuits in which the DEPE has sought various forms environmental compliance. Recently, on July 2, 1992, Madison was ordered by the Superior Court of New Jersey to post financial security and take measures to remediate groundwater contamination resulting from its operational and disposal practices. On November 24, 1992, shortly after the Appellate Division affirmed the July 2, 1992 Order, Madison filed a voluntary Chapter 11 petition pursuant to the Bankruptcy Code. This Chapter 11 bankruptcy is presently pending before the Honorable William H. Gindin, Chief United States Bankruptcy Judge.

On March 19, 1993, the DEPE filed an order to show cause along with a verified complaint in state court. The DEPE sought injunctive relief and statutory penalties for Madison's and OBC's failure to clean up the fertilizer pile which violated New Jersey's version of the RCRA. At a status conference before the bankruptcy court on April 2, 1993, it was disclosed by Madison's bankruptcy counsel that the DEPE had filed the March 19, 1993 action. At the status conference, the bankruptcy court requested that the DEPE file a motion so that the bankruptcy court could determine whether the DEPE had violated the automatic stay provisions of 11 U.S.C. §362 by commencing such an action. On April 21, 1993, the bankruptcy court held a hearing and concluded that the DEPE had transgressed the provisions of section 362 of the Bankruptcy Code. On May 5, 1993, the bankruptcy court signed the Order, being appealed here, which enjoined the DEPE "pursuant to the automatic stay provisions of 11 U.S.C. §362(a), from proceeding with the enforcement action only as instituted against [Madison]."

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<sup>3</sup> On June 25, 1993, the bankruptcy court amended its May 5, 1993 Order and held:

[T]he State be, and hereby is enjoined pursuant to the automatic stay provisions of 11 U.S.C. §362(a) from proceeding with the enforcement action instituted against the  
(continued...)

## II. DISCUSSION

### A. STANDARD OF REVIEW

The Bankruptcy Court's legal conclusions are subject to plenary review, and its finding of facts are scrutinized under a clearly erroneous standard. See *Fed. R. Bankr. P. 8013*; *J.P. Fyfe, Inc. v. Bradco Supply Corp.*, 891 F.2d 66, 69 (3d Cir. 1989) (citations omitted); *Torwico Electronics, Inc. v. State of New Jersey, Dept. of Environ. Protection and Energy*, 153 B.R. 24 (D.N.J. 1992).

### B. EXCEPTIONS TO THE AUTOMATIC STAY

A review of Bankruptcy Code section 362(a), (b)<sup>4</sup> & (b)5 and the Third Circuit's dispositive holding in *Penn Terra Ltd. v. Dept. of Environ. Resources*, 733 F.2d 267 (3d Cir. 1984), reveal that the bankruptcy court erred when ruling that the DEPE's March 19, 1993 enforcement actions violated the automatic stay provision of 11 U.S.C. Section 362. Thus, this Court reverses the bankruptcy court's Amended Order of June 25, 1993.

The United States Congress, in 11 U.S.C. Section 362, established the parameters of the automatic stay and its effect on a state's police and regulatory powers. Section 362 states in pertinent part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities.

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<sup>4</sup>(...continued)

Debtor to the extent that the State seeks (i) to recover any money from the Debtor; and (ii) equitable relief against the Debtor respecting *pre-petition* violations by the Debtor of environmental laws . . . .

*Id.* (West 1993). Congress, however, has unquestionably carved out an exception to the automatic stay in reference to a state's ability to protect the health and welfare of its citizens. Subsection (b) of 11 U.S.C. Section 362 provides:

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—

....

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

*Id.*

Upon reading the legislative history of sections 362 (b)4 and (b)5, it is apparent that Congress intended for a state's police and regulatory powers to include environmental protection actions. Specifically, the legislative history of Bankruptcy Code Section 362 states in pertinent part:

Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a government unit is suing a debtor to prevent or stop violation of fraud, *environmental protection*, consumer protection, safety . . . the action or proceedings not stayed under the automatic stay.

*Id.* (emphasis added). Based on a strict statutory reading of section 362 and its accompanying legislative history, one can ascertain that the DEPE, to effectuate its police powers, was exempt from the automatic stay. Specifically, the DEPE was warranted in going to state court to compel Madison to clean-up its hazardous waste pile.

Moreover, the Third Circuit, in *Penn Terra*, ruled that a state enforcing its environmental compliance laws is exempt from the automatic stay. In *Penn Terra*, a debtor filed a Chapter 7 petition in bankruptcy after failing to comply with Pennsylvania state environmental regulations. *Id.* at 269-70. Additionally, *Penn Terra*, the debtor, violated a consent order pursuant to which *Penn Terra* agreed to rectify its environmental violations. *Id.* at 270. Subsequent to filing the petition, Pennsylvania sought enforcement of the consent order and compliance with the state's environmental laws. *Id.* As a result, the debtor, pursuant to section 362, asserted that the state's actions were tantamount to a enforcement of a monetary judgment and moved to stay the state's action. *Id.*

The bankruptcy court held that the actions instituted by the State of Pennsylvania were actions to enforce a money judgment and therefore did not fall within the exception to §362(a). *Id.* at 270. Pursuant to that ruling, the bankruptcy court preliminarily enjoined Pennsylvania from enforcing its environmental action against the debtor. *Id.* On appeal, the district court affirmed the lower court's ruling. *Id.* Ultimately, the Third Circuit reversed. *Id.* at 270-71. The Third Circuit stated that the state's enforcement of its environmental laws was exempt from the automatic stay:

It first is clear to us that the actions taken by [Pennsylvania] in obtaining and attempting to enforce the Commonwealth Court's injunction falls squarely within Pennsylvania's police and regulatory powers. [Pennsylvania] seeks to force *Penn Terra* to rectify harmful environmental hazards. *No more obvious exercise of the State's power to protect the health, safety, and welfare of the public can be imagined.*

*Id.* (emphasis added).

The Third Circuit also rejected Penn Terra's assertion that Pennsylvania's enforcement of the environmental laws was an attempt to enforce a monetary judgement. *Id.* at 275. The court noted that

an important factor in identifying a proceeding as one to enforce a money judgment is whether the remedy would compensate for *past* wrongful acts resulting in injuries already suffered, or protect against potential *future* harm. Thus, it is unlikely that any action which seeks to prevent culpable conduct *in futuro* will, in normal course, manifest itself as an action for a money judgment, or one to enforce a money judgment. . . . Yet we cannot ignore the fundamental fact that, in contemporary times, almost everything costs something. An injunction which does not compel some expenditure or loss of monies may often be an effective nullity.

*Id.* at 278. Thus, based on *Penn Terra*, the DEPE's actions to enforce Madison's compliance with New Jersey's environmental compliance laws is an "obvious exercise of the State's power to protect the health, safety, and welfare of the public." *Id.* Moreover, although the injunction and mandatory non-compliance penalties will cause the debtor to expend funds to clean-up the site, it is not tantamount to the enforcement of a monetary judgment. As the Third Circuit noted in *Penn Terra*, "in contemporary times, almost everything costs something. An injunction which does not compel some expenditure or loss of monies may often be an effective nullity." *Id.* In this instances, the DEPE's statutory penalties merely give "teeth" to New Jersey's environmental laws. Because this Court finds that the bankruptcy court erred as a matter of law in concluding that the DEPE's environmental actions were not exempt from the automatic stay, the June 25, 1993 Amended Order of the bankruptcy court is hereby reversed. Accordingly, the remaining issues pertaining to the accuracy of the bankruptcy court's May 5 Order and June 25 Amended Order are dismissed as moot.

### III. CONCLUSION

For the foregoing reasons,

It is this 15 day of September, 1993,

ORDERED that the decision below is hereby REVERSED and this action REMANDED for further consideration consistent with this opinion.

  
GARRETT E. BROWN, JR., U.S.D.J.